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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-408

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, ET AL.

BRIEF FOR RESPONDENT, THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF UNITED STATES OF AMERICA

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Respondent The Connecticut Mutual Life Insurance Company respectfully requests the Court to deny the Petition for a Writ of Certiorari of Petitioner United States of America (Petitioner).

QUESTION PRESENTED

WHETHER THE "CHOATE LIEN" DOCTRINE DEVELOPED BY THIS COURT IN FEDERAL TAX LIEN CASES SHOULD BE EXTENDED TO A PRIVATE FIRST MORTGAGE LIEN COMPETING WITH A SECOND MORTGAGE LIEN OF THE UNITED STATES.

ARGUMENT

Under Connecticut Mutual's first mortgage, the mortgagor agreed that, in the event of foreclosure, the lender's attorney's fees incurred in the foreclosure would constitute a part of the indebtedness secured by the mortgage. (Petition for a Writ of Certiorari of the United States (hereinafter referred to as Petition), pp. A12-A13 f. 1) Such a provision is customary in most mortgages, as witness the similar provision in the United States' second mortgage.

Subsequent to the recording of Connecticut Mutual's first mortgage the United States, through the FHA, filed its second mortgage, utilizing a form of security instrument and a procedure for securing its loan created by State, not federal, law. The United States therefore, with its eyes open, accepted its second position, and acknowledged the priority of Connecticut Mutual's mortgage when it categorically stated *on the face of its second mortgage* that its mortgage was "Subject to mortgage held by the Connecticut Mutual Life Insurance Company". (Petition, p. 13 f. 2)

Under these circumstances ordinarily there would be no question that the first mortgage would be superior to the second in all respects, including the provision regarding attorney's fees. How then does the United States attempt to elevate its second mortgage ahead of the first mortgage? Essentially, the position of the United States is that the "choate lien" test, developed by this Court in three cases involving the federal *tax* lien, should be extended to cover situations involving only contractual mortgage liens.

The "choate lien" doctrine should not be confused (as is done by the United States in its brief and in some of the cases cited therein) with the "first-in-time,

first-in-right" doctrine. The latter doctrine has been a well-recognized rule of federal law since the time of Chief Justice Marshall (*Rankin & Schatzell* v. *Scott,* 12 Wheat. 177, 179), and applies generally to lien priority questions of all types—tax, contractual, or otherwise. When questions regarding the priority of the federal *tax* lien were raised, however, the "first-in-time, first-in-right" rule was first given the "choate lien" test gloss by this Court in *United States* v. *New Britain,* 347 U.S. 81, 85, and later in *United States* v. *Pioneer American Insurance Co.,* 374 U.S. 84, and *United States* v. *Equitable Life Assur. Soc.,* 384 U.S. 323; in all these cases the Court was confronted with "the recurring problem of priority contests between a state lien and a federal *tax* lien." (*United States* v. *Equitable Life Assur. Soc., supra* at 324. (Emphasis added.)) A good interpretation of the Court's purposes in establishing the "choate lien" rule in tax lien cases may be gleaned from a reading of *United States* v. *Bond,* 279 F.2d 837 (C.A. 4) (cited by the United States in its answer to the foreclosure complaint), where various references are made to the necessity for "zealous" and "assiduous" protection of the federal tax lien to "insure prompt and certain collection of the taxes due the United States". A reading of all these cases denotes the Court's clear concern for the federal *tax* lien and reveals no inclination of the Court toward extension of the rule to non-tax lien priority areas. To the contrary, the Court in *United States* v. *Equitable Life Assur. Soc., supra,* indicated that the "choate lien" test is not necessarily applicable in cases where the federal tax lien is not present:

> "*Security* (*Mortgage Co.* v. *Powers,* 278 U.S. 149 (1928)) did not involve a federal tax lien but

> raised 'federal questions peculiar to the law of bankruptcy.' . . . Our opinion in Pioneer American specifically pointed out that Security has no application to federal tax lien cases because the issue there was the status of an attorney's fee clause in a *bankruptcy* proceeding 'where the rigorous federal lien choateness test was not necessarily applicable.'" (384 U.S. 329.)

The Court of Appeals below quite properly, therefore, concluded that no ruling of this Court required that the "choate lien" test be applied to a non-federal tax lien case, as here. Finding no other lower court cases on the question,[1] it pointed to the intent of Con-

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[1] None of the lower court cases cited in the Petition of the United States involved the question now before this Court. As the Petition defensively points out, the case of *H.B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F.2d 156 (C.A. 4), quoted and strongly relied on in the Petition, involves the federal *insolvency statute* (31 U.S.C. 191), where, as this Court has stated, different standards prevail, even from the standards applicable to the federal tax lien. (United States v. Vermont, 377 U.S. 351, 357).

None of the remaining cases cited in the Petition of the United States (Petition, p. 9 f. 4) as "inconsistent" with the lower court's opinion involved a private first mortgage lien in competition with a second mortgage lien of the United States. A close reading reveals that these decisions turned simply on the well-established "first-in-time, first-in-right" rule and the result would have been the same with or without applying the "choate lien" test. An example is the cited case of *United States* v. *Roessling*, 280 F.2d 933 (C.A. 5), where the first mortgage of the United States, recorded in 1937, was competing with a state real property tax lien for the year 1940—a situation clearly covered by "first-in-time, first-in-right". *Roessling's* "inconsistency" with the lower court's opinion for purposes of requiring a grant of certiorari is somewhat suspect, in any case, since both are from the Fifth Circuit Court of Appeals.

gress in the Federal Tax Lien Act of 1966 in abolishing the "choate lien" test in federal *tax* lien matters as a basis for not extending the court-made rule to *non-tax* lien cases. The lower court did not, as stated in the Petition of the United States, determine that the Federal Tax Lien Act of 1966 abolished the "choate lien" rule in cases such as this; rather, it ruled that the "choate lien" test had not previously been extended to non-tax lien cases such as this, and that the Act evidenced a Congressional intent that the rule be limited or abolished.

In sum, this Court has not authorized the use of the "choate lien" test in conjunction with the "first-in-time, first-in-right" doctrine outside the federal tax lien field. Congress has abolished this test even in federal tax lien cases. No lower court has extended the rule to cases of a private first mortgage lien competing with a second mortgage lien of the United States. The lower court properly concluded therefore that the United States' second mortgage should be subject to the well-settled federal rule of "first-in-time, first-in-right". No other courts having considered this specific question, there can be no inconsistent lower court decisions requiring resolution by this Court. More importantly, however, the voluntary act of the United States in taking a second position acknowledged by it to be "subject to mortgage held by the Connecticut Mutual Life Insurance Company" was recognition by it of the priority of Connecticut Mutual's first mortgage lien, including attorney's fees, and scarcely justifies the invocation of the certiorari jurisdiction of this Court.

CONCLUSION

The Petition for a Writ of Certiorari of the United States of America raises no question of federal law requiring resolution by this Court and should be denied.

Respectfully submitted,

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